A. Certain Fundamental Prerequisites Must Be Satisfied Before Any MDU Wiring Disposition Procedures Can Apply.

In this proceeding, the Commission is considering adoption of rules that could have wide-ranging effects on the property, contractual and other legal rights of incumbent video service provider, MDU owners, and MDU residents. Thus, in recognition of the sensitivity of these issues, the Commission's Further Notice properly establishes certain fundamental prerequisites that must be satisfied before any MDU wiring disposition procedures are applicable. For example, the Commission recognizes that the proposed procedures

> would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner. In other words, these procedures would not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property.[41]

Indeed, the Commission's theory that its proposed rule would not constitute an unconstitutional taking of an incumbent provider's property without just compensation is premised on this foundation.[42] Similarly, the Further Notice is careful to stress that the proposed "procedural mechanisms will not create or destroy any property rights" and that the Commission is "not proposing to preempt an incumbent's ability to rely upon any rights it may have under state law."[43] Despite these unambiguous pronouncements, Time Warner is concerned that certain other statements in the Further Notice may be taken out of context or otherwise misconstrued in an effort to undermine these fundamental principles. Accordingly, Time Warner urges the Commission to adopt the following clarifications.

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[41] Id. at ¶ 34.

[42] See id. at ¶ 72.

[43] Id. at ¶¶ 32, 34.

1. Home Run Disposition Rules Should Only Apply Where The Parties Have Otherwise Failed To Address Such Issues Contractually.

It is Time Warner's experience that the vast majority of contracts between MDU owners and MVPDs, particularly those entered into in the last 10-15 years, directly address issues relating to disposition of the internal MDU wiring upon expiration of the contract. Sometimes the contract allows Time Warner to remove its facilities, sometimes the contract allows Time Warner to leave its dormant facilities in place for future use, and sometimes the contract allows the MDU owner or subsequent MVPD to purchase or lease the facilities at a negotiated price. Regardless of how these issues are resolved, the Commission's goal of promoting certainty is served far more efficiently, and with less administrative burden to the Commission, through such arm's length negotiations than through a complex regulatory regime. Moreover, any interference with such contractual provisions would directly contravene the Commission's fundamental intention not to create or destroy any property rights. Along these lines, the Commission should further clarify that any rules would not apply where a provider has a continuing contractual right to either offer service to building residents or to retain dormant facilities on the building's premises even after the expiration of a service contract.

The Further Notice states that its proposed modification of the current home wiring rule "should not override a bulk service contract that specifically provides for disposition of the wiring upon termination of the contract."[44] Time Warner is concerned that unscrupulous MDU owners or competing MVPDs may attempt to twist this statement to

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[44]Id. at ¶ 76.

imply that the proposed rules would overrule any non-bulk agreements that expressly provide for disposition of the wiring. Obviously, such an interpretation would "create or destroy" property rights and might even serve to "preempt an incumbent's ability to rely upon any rights it may have under state law."[45] Even ICTA itself recognizes that a cable operator is entitled to "protect itself by obtaining a property owner's agreement guaranteeing the operator access to the property."[46] Thus, the Commission should unambiguously confirm that any procedures relating to the disposition of MDU home run wiring would apply only where the parties have failed to address disposition issues contractually.

2. Home Run Disposition Rules Can Only Apply Where The Incumbent MVPD Has No Continuing Contractual Or Legal Right To Provide Service To Residents Of The MDU Or Retain Its Facilities Within the MDU.

As the Commission stated in the Further Notice:

> We propose that the procedural mechanisms described below would apply only where the incumbent provider no longer has an enforceable right to remain on the premises against the will of the MDU owner. In other words, these procedures would not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home runs on the property. In the building-by-building context, the procedures below would not apply where the incumbent provider has a legally enforceable right to maintain its home run wiring on the premises against the MDU owner's wishes and prevent any third party from using the wiring; in the unit-by-unit context, the procedures below would not apply where the incumbent provider has a legally enforceable right to keep a particular home run wire dedicated to a particular unit . . . on the premises against the property owner's wishes. We are not proposing to preempt an incumbent's ability to rely on rights it may have under state law.[47]

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[45]Id. at ¶¶ 32, 34.

[46]Id. at ¶ 22.

[47]Id. at ¶ 34.

Similarly, the Further Notice recites that "procedural mechanisms would not apply until the cable operator has no legally enforceable right to remain on the premises and the MDU owner and/or subscriber terminates the operator's service."[48] The foregoing language confirms that the proposed rules would only apply in those specific situations where an incumbent's rights are fully exhausted. However, as was the case with respect to contracts where the parties have already addressed wiring disposition issues, Time Warner is concerned that other statements in the Further Notice might be distorted to undermine the clear principles set forth above.

For example, at paragraph 35 of the Further Notice, in describing the proposal for building-by-building disposition of home run wiring, the Commission states that "the MDU owner may give the incumbent service provider a minimum of 90 days' notice that the provider's access to the entire building will be terminated." In a footnote, the Further Notice goes on to say that the "MDU owner may, of course, choose to terminate the incumbent provider's access rights pursuant to the terms of a contractual agreement between the parties, rather than pursuant to the procedures we propose herein."[49] Such imprecise language could be construed to create the impression that the proposed rules somehow give the MDU owner the unilateral right to terminate an existing contract prior to its natural expiration. Similarly, paragraph 76 contains the statement that the Commission's "home wiring rules would be triggered when an MDU owner terminates service for the entire building." But this statement must be read in connection with the immediately preceding

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[48] Id. at ¶ 66.

[49] Id. at n.97.

sentence, which states that such procedures apply only where "the MDU owner has the legal right, either by law or by contract, to terminate the subscriber's cable service."[50]

Accordingly, the Commission must expressly clarify that MDU owners cannot unilaterally order the incumbent provider to cease service to MDU residents. The rules must be clear that any such procedures can lawfully apply only where the incumbent provider's contract to serve the MDU has expired and has not been renewed, and the incumbent no longer has a right to maintain its home run wiring on the MDU property "against the will of the MDU owner."[51] Unless a clear pronouncement is made that this is the case, there is a great likelihood that parties may attempt to use the new rules to abrogate a legally valid contract under the guise of Commission preemption.

Similarly, the Further Notice seeks "comment on whether the Commission can and should create any presumptions or other mechanisms regarding the relative rights of the parties if the incumbent's right to remain on the premises is disputed."[52] The FCC should not adopt any such presumptions, and indeed cannot. Any such presumptions would contravene the Commission's commitment not to "create or destroy any property rights,"[53] nor to "preempt an incumbent's ability to rely upon any rights it may have under state law."[54] Indeed, as explained in detail at Section IV.C. of these Comments, any such

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[50] Id. at ¶ 76 (emphasis added).

[51] Id. at ¶ 34.

[52] Id.

[53] Id at ¶ 32.

[54] Id. at ¶ 34.

presumption would result in an unconstitutional taking of property. Thus, the Commission must clarify that its procedures would not apply in any case where there is any dispute over the incumbent's right to continue to serve the MDU, over ownership of any facilities on the premises of the MDU, or over the right of the incumbent to maintain its facilities on the MDU premises after expiration of the contract, until such dispute has been resolved with finality under local law (or where the statute of limitations for the enforcement of such a legal right has expired). Only in this way can the Commission ensure that its proposed procedural mechanisms "would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner."[55]

Most importantly, however, the Commission must clarify that the rules do not apply in a state where a mandatory access statute assures a franchised cable operator's right to access an MDU. Such statutes exist in part because of a franchised cable operators' obligation to universally serve residents in a community, as well as a reflection and recognition of the public service obligations me. by franchised cable operators. In most instances, such statutes grant franchised cable operators the right, and even the obligation, to serve MDU residents, and thereby prevent MDU owners from denying access to their buildings. The Commission must clearly state that where such access is guaranteed, MDU owners do not have the right under any new Commission rules to ignore such a statute.

In this regard, a troubling concept suggested by the Further Notice in a footnote appears to discount the legal rights confirmed by mandatory access statutes. In the

[55] Id. (emphasis added).

Commission's proposal for unit-by-unit disposition of home run wiring, the Commission asserts in footnote 100 that

> if a state mandatory access statute only gives a provider access rights to an MDU if a resident requests service, once the resident no longer requests that provider's service, the provider's right to maintain a home run wiring dedicated to that subscriber would be extinguished.[56]

The assumption underlying this contention is incorrect, and Time Warner seeks to clarify that procedures governing the disposition of home run wiring cannot apply in states with mandatory access statutes (or where other local law provides a right of access), because all such laws preserve the provider's rights to remain on the premises.

First, contrary to the Commission's unsupported assertion, most states' mandatory access statutes are not triggered by a tenant's request for cable service, and would, therefore, not fall within the scenario described by the Commission in footnote 100.[57] Most mandatory access statutes simply state that owners of MDUs shall not interfere with the installation of cable television facilities upon their property, or that residents of MDUs shall not be denied access to any available franchised or licensed cable television service. Often the mandatory access provision is subject to conditions such as requiring that the cost of the cable wiring be assumed by the cable operator installing such wiring; that the cable operator indemnify the MDU owner for any damage caused by the cable wiring; and forbidding the

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[56] Id. at n.100.

[57] See D.C. Code Ann. § 43-1844.1; Fla. Stat. § 718.1232; Kan. Stat. Ann. § 58-2553; Me. Rev. Stat. Ann. tit. 14, § 6041; Minn. Stat. § 238.23; N.J. Stat. Ann. § 48:5A-49; N.Y. Pub. Ser. Law § 228 (formerly, N.Y. Exec. Law § 828); R.I. Gen. Laws § 39-19-10; Wis. Stat. § 66.085.

MDU owner from demanding or accepting payment from the cable operator in exchange for permitting cable facilities to be installed on or within his property or premises. However, such statutes uniformly allow cable operators to install and maintain broadband facilities in MDU buildings. Thus, a fundamental precondition of the ICTA proposal simply can never be satisfied in the face of a mandatory right of access, since in any state or community with a mandatory access right, the incumbent provider *per se* has a perpetual and "legally enforceable right to maintain its home run wiring on the premises against the MDU owner's wishes and prevent any third party from using the wiring."[58] Indeed, the Commission expressly recognizes this legal concept elsewhere in the Further Notice, flatly contradicting the erroneous assumption in footnote 100.[59]

The Appellate Division of New York's Supreme Court has specifically addressed the issue of whether cable companies must install wiring piecemeal to serve only those tenants requesting service, or whether the right to install applies building-wide. The court "upheld as reasonable . . . the [New York State Commission on Cable Television's] interpretation of Executive Law § 828 [now Public Service Law § 228] as authorizing building-wide rather than piecemeal installation."[60] In that case, eight landlords under contract to Liberty Cable argued that Time Warner should be permitted to install upgraded cable facilities, particularly home run cable wiring, only to those apartment units currently requesting Time Warner's cable service, with subsequent installation of home run wiring made only if, as, and when

[58]Further Notice at ¶ 34.

[59]Id. at n.44, ¶ 29.

[60]86th Street Tenants Corp. v. New York State Comm'n on Cable Television, 627 N.Y.S.2d 693, 694-95 (A.D. 1 Dept. 1995).

requests for cable service are made. The New York State Commission on Cable Television ("NYSCCT") specifically rejected this argument, stating that the "argument is misplaced for many reasons."[61] The NYSCCT went on to say that a provision in Manhattan Cable's franchise agreement that obligates the company to wire only such residents requesting service, and not the entire building "was not intended to diminish in any way a cable operator's rights to install cable television facilities under Section 828 of the New York State Executive Law."[62]

It is clear that the Commission's belief asserted in footnote 100 of the Further Notice does not reflect the interpretation given by controlling New York authority to New York's mandatory cable access statute. In New York, franchised cable operators have the right to maintain their cable wiring throughout the building, and do not have to remove portions of it simply because there is no current request for franchised cable service, or because a competing MVPD is serving the same building.

Second, for those few states whose mandatory access statutes are triggered by a tenant's request for cable service,[63] such statutory language was merely intended to ensure that the tenant was not forced to take cable television service, but rather had the option of receiving such service. Mandatory access provisions that are triggered by a tenant's request for service do not give the MDU owner any additional legal rights. Furthermore, those

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[61]Petition of Manhattan Cable Television, Inc., Order of Entry, Docket No. 80296, at 2 (NYSCCT, rel. January 14, 1993) (this Order of Entry was made a part of the record before the Appellate Division in the 86th Street case, *supra*).

[62]Id.

[63]See Conn. Gen. Stat. § 16-333a; 65 Ill. Comp. Stat. 5/11-52-11.1; Mass. Ann. Laws ch. 166A, § 22; 68 P.S. § 250.503-B (Pennsylvania).

access provisions that are triggered by a tenant's request for service mean only that at least one tenant of the MDU must initially request service in order for the cable operator to be permitted to install its wiring throughout the MDU building, and then offer its service to the other residents thereof.[64]

States with mandatory access provisions triggered by a tenant's request also permit the cable operator to maintain its wiring within MDUs indefinitely.[65] The Commission's belief that in these states, once an MDU resident terminates cable service, the cable operator's right to maintain its home run wiring dedicated to that subscriber's dwelling unit would be extinguished, is simply not supported by existing law.[66] For example, under Pennsylvania's mandatory access provision, a tenant has the right to request and receive CATV service, and a landlord may not prohibit or otherwise prevent a tenant from requesting or acquiring CATV service from an operator of the tenant's choice provided that there has been an agreement between a landlord and an operator through a negotiation process outlined in a subsequent statutory provision.[67] The statute also grants to operators whose service has been requested an ongoing right of access to the building "for the purpose of constructing, reconstructing, installing, servicing or repairing CATV system facilities," and goes on to

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[64]See 68 P.S. § 250.503-B; Conn. Gen. Stat. § 16-333a(b); Mass. Ann. Laws ch. 166A, § 22; see also 65 Ill. Comp. Stat. 5/11-52-11.1(a)(ii) (request for cable service must be made by more than three tenants of the MDU for cable operator to be permitted to install cable facilities throughout the building in order to provide cable service to the tenants of other residential units as well).

[65]See, e.g., 68 P.S. § 250.503-B.

[66]See id.

[67]Id.

provide that the "operator shall retain ownership of all wiring and equipment used in any installation or upgrade of a CATV system in multiple dwelling premises."[68] Significantly, ownership of all CATV wiring and equipment is retained even though the statute prohibits an operator from providing "CATV service to an individual dwelling unit unless permission has been given by or received from the tenant occupying the unit."[69]

The fact that Pennsylvania's statute allows tenants to receive CATV service from an "operator of the tenant's choice" shows that multiple wires are allowed in an MDU under Pennsylvania law, thereby promoting subscriber choice among concurrently available MVPD services. The law further mandates that ownership of those wires is retained by the entity that installed them, even if the operator is no longer providing service over that wiring to a particular dwelling unit.[70] The Commission itself has stated that "an incumbent's ability to rely upon any rights it may have under state law" shall not be preempted by the home wiring regulations.[71] Accordingly, the Commission should expressly reaffirm that nothing in footnote 100 or elsewhere in this docket is intended to overrule or conflict with the interpretations by appropriate state agencies or courts with respect to MDU access laws.

B. Suggested Refinements To Any MDU Home Run Wiring Disposition Procedures.

As Time Warner has demonstrated above, applying home run disposition procedures to building-by-building MVPD transitions would fail to advance the broad goals established

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[68]Id. (emphasis added).

[69]Id.

[70]Id.

[71]Further Notice at ¶ 34.

by Congress, or the specific goals that the Commission professes should apply to this proceeding, i.e., enhancement of consumer choice and avoidance of disruption caused by removal of broadband facilities. Moreover, as explained in Section IV of these Comments, the Commission is utterly lacking in jurisdictional authority to adopt such procedures. Nevertheless, should the Commission proceed down this path, Time Warner suggests the following refinements to the proposed procedures.

1. Building-By-Building Transitions.

As a preliminary matter, it has been demonstrated in detail above that building-by-building transitions do not empower MDU residents to choose between providers. Indeed, the Commission has expressly recognized that "subscriber choice would be enhanced by the use of multiple wires"[72] and that "in the unit-by-unit context, the MDU owner would be expanding its residents' choices, not restricting them,"[73] an implicit admission that the building-by-building approach affords MDU residents "no choice at all."[74] Remarkably, while it acknowledges that "subscriber choice would be enhanced by the use of multiple wires"[75] and that "Congress intended for Section 624(i) to promote individual subscriber choice whenever possible,"[76] the Commission then goes on to propose rules that utterly fail to create incentives for MDU owners to allow multiwire competition inside their buildings.

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[72]Id. at ¶ 62.

[73]Id. at ¶ 47.

[74]Id. at ¶ 46.

[75]Id. at ¶ 62.

[76]Id. at ¶ 81.

The proposal simply does nothing to address, much less alleviate, the problems caused by MDU owner bottleneck control over installation of multiple broadband distribution paths. As described above, while the Further Notice repeatedly acknowledges that MDU owners are the real bottlenecks to the benefits of competition, it paradoxically proposes to enhance MDU owners' power to remove an incumbent provider and replace it with a new exclusive provider. In order to create incentives for MDU owners to allow unit-by-unit competition, the proposed procedures should apply only where the MDU owner agrees to allow unit-by-unit competition, not where the MDU owner seeks to accomplish a building-by-building transition.

Further, the record in this proceeding amply demonstrates that MDU owners' decisions are more often dictated by the level of consideration offered by the MVPD than by which MVPD offers the widest array of programming, most attractive prices, or best customer service. While some MDU owners sanctimoniously deny such crass economic motivations, there is one simple way for the Commission to help ensure that consumer welfare is given top priority. The Commission's home run disposition rules should not apply in any situation where the MDU owner has received any form of excess consideration from the MVPD seeking entry, above and beyond the nominal just compensation paid for allowing broadband distribution to occupy the MDU property.[77] This will ensure that MDU owners seeking to take advantage of the beneficial procedural mechanism embodied in the

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[77]In New York, for example, state law requires franchised cable operators to provide MDU property owners just compensation for access to their building pursuant to the state right of access law. Any amount more than a nominal amount to reflect the occupancy of the wiring is an impermissible payment under New York law. N.Y. Pub. Ser. L. § 228(1)(b).

Commission's rules will make their choices regarding MVPD access to their buildings solely on the basis of the nature of the services and other benefits such MVPD will offer directly to MDU residents, not to the MDU owner.

Similarly, the benefits of the proposed FCC procedures should not apply in any situation where the MDU owner bundles service provided by the incoming MVPD with the rent. In such situations, the MDU owner is, in effect, reselling the MVPD service and can capture an undetected markup through a rent increase. The ability of MDU residents to choose alternative MVPDs, or even to decline MVPD service, is frustrated because the MDU resident is forced to pay for the MVPD service selected by the MDU owner whether the resident wants it or not. On the other hand, bulk discounts which are directly marketed to MDU residents should be encouraged, because the MDU resident has the discretion to decline, and therefore avoid paying for, the MVPD service. Such arrangements often provide for a sliding scale of discounts, with a higher discount available as a larger percentage of MDU residents agree to take the MVPD's service. Thus, the MDU owner can negotiate the best possible deal for his residents, without forcing any residents to receive or pay for service they do not want.

Such a requirement would divorce the MDU owner's own immediate economic interest in making the decision whether or not to allow competing providers access to its buildings. With no possibility of an economic windfall for the MDU owner, the only interests left for it to consider are those of its residents, specifically which provider delivers the best service, programming and price. Such a restriction on the use of the building-by-building rules would also produce those decisions that would occur without distortion caused by the MDU owner's ability to act as a gatekeeper.

In the Further Notice, the Commission claimed that "duplicating the behavior of a competitive market" was one of its goals.[78] This simple refinement, dislodging the MDU owner's incentive to act against the best interest of its residents in deciding which service provider shall be granted access, produces results that most accurately reflect the decisions made where the MDU owner could not deny access to multiple MVPDs. Indeed, such a rule would most likely produce results that would be the case if residents decided collectively, without input from an MDU owner, both as to whether to limit access to a single provider, and as to which single provider to allow to access the building. Furthermore, after investigation, and without incentive to limit access, many landlords might even decide that the benefits of vibrant competition, providing a diversity of programming and price points, is well worth making available to their residents. Such a result would clearly produce what the Commission acknowledges is the best possible outcome.

Based on Time Warner's experience, allowing the incumbent MVPD to "elect" to sell, followed by non-binding price negotiations among the parties, will be nothing more than a waste of time for all concerned. As long as the MDU owner or alternate MVPD has any hope of seizing the incumbent's home runs without consideration, there will be no incentive for them to offer a fair price. Indeed, conversations with the FCC staff prior to issuance of the Further Notice revealed a similar concern that arm's length negotiations were unlikely to

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[78] Id. at ¶ 62.

result in a mutually satisfactory agreement among the parties.[79] The answer from some FCC staff members was that, if the MDU owner fails to offer a satisfactory price, the MVPD can always tear out the home runs. After the incumbent actually follows through with this a few times, the MDU owners will learn their lesson and agree to fair prices in the future. Such a process would only lead to wasteful destruction of facilities and even more heated disputes.

Rather than a procedure which merely escalates the level of gamesmanship, Time Warner suggests the following approach. During the 90-day period prior to the expiration of the incumbent MVPD's right to offer service or maintain its facilities in a particular MDU, the MDU owner, not the MVPD, would be required to elect one of the following and inform the incumbent MVPD of such election:

1) MDU owner (or subsequent MVPD) will buy the home runs at fair market value; or

2) MDU owner will allow the incumbent MVPD to remove the home runs at the sole expense of the MDU owner; or

3) MDU owner will allow the incumbent MVPD to retain its facilities on the property, with the right to exclude others from the use of such facilities.

If the MDU owner elects to purchase the home runs, then Time Warner suggests that the same 30 day period proposed by the Commission be established for good faith negotiations. However, if the parties are unable to agree, the fair market value would be established through binding arbitration, with the cost of the arbitration procedure split by the parties. Thus, with both parties fully aware that a disinterested third party will ultimately

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[79]See also id. at ¶ 37.

establish a fair price, it is much less likely that gamesmanship will ensue. Moreover, the Commission's goal of certainty will be achieved, since whenever the MDU owner elects to purchase, the incoming MVPD will know that it will be able to use the home runs. Under the ICTA proposal, on the other hand, where the incumbent elects to sell, there is no guarantee that either the MDU owner or incoming MVPD will buy, and the incumbent may be forced to remove its home runs if there is no agreement.

If the MDU owner decides not to purchase the home runs, and it does not want the home runs to remain on the premises, it is only reasonable that the MDU owner bear the cost of removal. This approach will avoid protracted disputes relating to the incumbent's ambiguous obligation under the ICTA proposal to "restore the MDU to its prior condition." Does this mean patch any holes in the walls? Repaint all the hallways? Replace all the wallpaper? The opportunities for disputes, and for the MDU owner to extort payments from the incumbent MVPD, are endless and can be readily avoided. If the MDU owner is responsible for the cost of removal, the MDU owner can dictate which level of restoration by the MVPD meets its satisfaction. On the other hand, if the MDU owner is willing to allow the incumbent's facilities to remain, that option is also available. But where the MDU owner/incoming provider has not elected to purchase the home runs, the incumbent provider would be entitled to prevent others from using its facilities.

2. Unit-By-Unit Competition Should Be Encouraged.

As explained above, if the Commission proceeds to adopt procedures relating to the disposition of home run wiring, Time Warner urges that such procedures apply <u>only</u> where the MDU owner elects to allow unit-by-unit competition in a particular MDU building.[80] By so targeting its advantageous procedures, the Commission will be creating incentives for MDU owners to allow unit-by-unit competition, and thereby foster expanded choice for MDU residents among competing providers.[81] Where such competition is elected, the incoming provider would be required to reimburse the incumbent MVPD for fifty percent of the fair market value of the home runs, reflecting their equal right to use such home runs in the event of a request for that MVPD's service from a particular MDU resident. Fair market value would be established through negotiation or binding arbitration, just as described above under the building-by-building approach. Subsequent MVPDs would reimburse any existing MVPDs *pro rata*. Thus, if four MVPDs were allowed to install risers and market their services in an MDU, each would be responsible for 25 percent of the fair market value of the home runs. Moreover, to ensure a level playing field, each MVPD would be entitled to

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[80]The Further Notice presents the MDU owner's election between building-by-building and unit-by-unit competition a choice between equals, implying that MDU owners will be somewhat indifferent between the two, deferring to their residents' best interest in making such decisions. But these two options are not equals, either in the eyes of the MDU owners or MDU residents. Of these two scenarios, clearly the second, whereby MDU residents are empowered to choose for themselves among multiple video service providers, is the most pro-competitive and best serves the residents' interests. Through such unit-by-unit competition, consumers can decide for themselves which service providers deliver the best mix of price, programming, and service to meet their individual needs. By contrast, the first option, building-by-building competition, serves only the MDU owner's interest in enhancing the ability to extract tribute from the MVPD, and does nothing to promote consumer welfare. Instead of consumers being empowered to decide between competing providers, they are simply forced to accept the single video service provider choice of the MDU owner, most often the provider offering the MDU owner the most compensation for access to the building. But, as the pull of compensation from an exclusive provider is so great, under the proposed rules, MDU owners will always have powerful incentives to choose the first option and deny their residents access to multiple providers.

[81]See Further Notice at ¶ 47.

the same contract length. Finally, for the reasons explained above, no MVPD would be allowed to pay compensation to the MDU owner, and no MVPD would be allowed to bundle its service in the rent. However, bulk discounts for services marketed directly to MDU residents, and not bundled in the rent, would be permitted.

3. No Default Price Should Be Set For The Valuation Of Home Run Wiring.

The Commission must not set a default price to be used in valuation of MDU inside wiring in situations where an incumbent video service provider has elected to sell the wiring.[82] Any such default price, in practice, would become a *de facto* ceiling because the MDU owner would know it would never have to pay more, and thus the MDU owner would have no incentive to offer an incumbent provider any amount above the default price.

Such a default, because it would set a maximum value on a provider's property that is taken pursuant to government action, would result in an unconstitutional taking without just compensation. Under Constitutional principles, the ascertainment of just compensation is to be determined by adjudication and no government agency may establish the level of just compensation for a taking of property by regulation.[83] In order to pass constitutional muster, any determination of what constitutes just compensation for wiring taken from an incumbent MVPD serving an MDU must assure the availability of a *de novo* adjudication of

[82]See id. at ¶ 37.

[83]See Florida Power Corp. v. FCC, 772 F.2d 1537, 1545 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987); United States v. 15.3 Acres of Land, 154 F. Supp. 770, 773 (M.D. Pa. 1957); see also Baltimore & Ohio R.R. Co. v. United States, 298 U.S. 349, 364, 368-69 (1936).

the appropriate amount.[84] Thus, at a bare minimum, if the Commission establishes a default price for the taking of home-run wiring, the incumbent MVPD must be provided the right to a *de novo* adjudication of just compensation, e.g., before an Administrative Law Judge, subject to judicial review.[85]

Furthermore, any such valuation must include considerations of the fair market value of the wiring. In crafting any price that allegedly adequately provides cable operators with "just compensation" when their internal distribution wiring inside MDUs is taken from them, the Commission must consider more than just the depreciated book value or even the original cost of the wiring. Indeed, both the Constitution and the 1992 Cable Act mandate that the Commission provide reimbursement for the full "fair market value" of the wiring when

[84]Baltimore & Ohio R.R., 298 U.S. at 368-69.

[85]The Eleventh Circuit explicitly held that the FCC, an administrative agency of the executive branch, lacked the power to determine by regulation what is or is not just compensation for purposes of the Fifth Amendment takings clause. Florida Power, 772 F.2d at 1544. The Eleventh Circuit interpreted section (d) of the Pole Attachments Act as prescribing a binding rule for the final ascertainment of just compensation. It viewed this provision as a legislative usurpation of what has long been held to be an adjudicatory function. Id. at 1546. The court cited Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893), for the proposition that the determination of just compensation under the Fifth Amendment is exclusively an adjudicatory function and that it "does not rest with Congress to say what compensation shall be paid, or even what shall be the rule of compensation." The court also cited Miller v. United States, 620 F.2d 812 (Ct. Cl. 1980), and American Hawaiian Steamship Co. v. United States, 124 F. Supp. 378 (Ct. Cl. 1954), as examples of cases where the courts have struck down legislatively imposed standards for just compensation as unconstitutional because they did not allow for an adjudication to determine just compensation. See also Section IV.C., *infra*, for full discussion of the just compensation issue.

determining "just compensation" for a taking of a crucial portion of a cable operator's distribution plant.[86]

As such, any standard for compensation adopted by the Commission must include the business value of the wiring to the extent it would be considered by willing buyers of the property pursuant to a sale on the open market. Providing a cable operator merely an arbitrary, general valuation of the wiring would not compensate it for the economic value of its distribution system and would not satisfy just compensation any more than the depreciated value of the bricks would compensate for the condemnation of an apartment building.[87]

Further, the use of "fair market value" in each case is mandated by Congress. "Fair market value" is the very same standard by which Congress instructed cable operator distribution plant be valued when this plant is taken from the cable operator, through no fault of its own, by local franchising authorities. The 1984 Cable Act set forth specific

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[86]Under well-established Constitutional principles, the owner of "taken" property "is entitled to be placed in as good a position pecuniarily as if his property had not been taken." See, e.g., Olson v. United States, 292 U.S. 246, 255 (1934); United States v. 50 Acres of Land, 469 U.S. 24, 33 (1984). As such, courts have clearly established that "just compensation" means the "fair market value" of the property when appropriated. See, e.g., Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 10 (1984). Courts have repeatedly defined "fair market value" as the price a willing buyer would pay a willing seller for the property in the open market, taking into account all factors that a reasonable buyer and seller would consider in making such a transaction. See, e.g., United States v. 50 Acres of Land, 469 U.S. at 25 n.1; United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979). As such, "fair market value" in the context of cable operator wiring must include the business value of the cable operator's MDU distribution system.

[87]A fair market value test is further compelled by the fact that the entire economic value of the home runs will be taken from the incumbent provider under the ICTA proposal. By contrast, in the case of a partial taking, such as when a provider seeks to install facilities in an MDU pursuant to a right of access statute, courts properly look at the value of the property to the MDU owner before and after the taking, often resulting in a nominal award of just compensation.

requirements establishing the conditions of sale for cable systems where renewal has been denied or a franchise revoked, including the acceptable measure of value for such systems.[88] For cable systems denied renewal, the measure of value is "at fair market value, determined on the basis of the cable system valued as a going concern but with no value allocated to the franchise itself. . . ."[89] This same standard should apply where cable operators' plant inside MDUs is taken from them upon non-renewal of an MDU service contract.

The House Report, in explaining the use of the fair market value standard, indicates that this standard is the most appropriate mechanism for compensating cable operators for their plant, and explicitly rejects the notion that the depreciated book value adequately measure the value of a cable operators' distribution plant:

> Because renewal of the franchise has been denied, no value may be attributed to the permission to operate that the franchise represents. Requiring the franchising authority or mandated third party to pay fair market value as an ongoing business will place the franchising authority in a position comparable with a voluntary sale to a private party at the end of the franchise. In other words, it is intended that the factors that would normally go into the arms-length determination of a price between a willing buyer and a willing seller be considered in determining fair market value under this section. Factors such as system cash flow, existing and potential goodwill, existing arrangements with programmers, subscribers, and other benefits associated with an ongoing business would be incorporated into the valuation. <u>This does not require fair market value to be linked to a depreciated book value.</u> Rather it is a value which a

[88] 47 U.S.C. § 547.

[89] 47 U.S.C. § 547(a)(1).

> willing buyer would purchase the system as an ongoing business recognizing that the existing franchise has expired.[90]

The use of the default price designed to compensate cable operators, especially when the practical effect of such a price sets a ceiling on the value an incumbent provider can receive for its property, is inconsistent with both Constitutional principles and with the 1984 Cable Act.

4. Neither The MDU Owner Nor The New Competing Video Provider Should Be Allowed To Act As An MDU Resident's Agent.

The Further Notice "tentatively conclude[s] that it would streamline and expedite the process to permit the alternative service provider or the MDU owner to act as the subscriber's agent in providing notice of a subscriber's desire to change services."[91] The Commission should not allow either the MDU owner or the competing MVPD to act as the agent of the MDU resident unless the incumbent MVPD has expressly agreed to such an arrangement.

Time Warner has experienced numerous situations recently, either in buildings that permit unit-by-unit competition, or are located in right of access states, where MDU owners or competing MVPDs act as an alleged agent for the MDU's residents, switching their service over from one service provider to a new provider without the affirmative consent from the residents affected (commonly referred to as "slamming"). In New York City, where Time Warner has the right and obligation to serve all MDU residents pursuant to an access statute, in buildings served by both Time Warner and an alternative video provider,

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[90] H.R. Rep. No. 934, 98th Cong., 2d Sess. 76 (1984) (emphasis added).

[91] Further Notice at ¶ 39.

RCN, Time Warner MDU subscribers have been repeatedly switched without their knowledge or consent. One of the most egregious situations is described in the letters by a disgruntled MDU resident, which are submitted as Exhibit A. Any new rules must clarify that such behavior is impermissible and would lead to sanctions against the offending party, analogous to those applicable to long distance carrier slamming. The Commission must also pronounce that such behavior is contrary to the stated public policy goal of promoting consumer choice, and is not in any manner sanctioned by the Commission's inside wiring rules as they now exist or are revised. There is no valid reason, in a building subject to a right of access statute or where residents have the right to take video service from multiple providers, why any third party can better make such decisions than the residents themselves.

Agency representation also often results in extensive damage to the property and equipment of the video service provider that is displaced. MDU owners and new video service providers have little incentive to protect the incumbent's equipment between the time that a customer switchover has occurred and the time that the incumbent is informed of the switch, and has an opportunity to retrieve its equipment. Many times, Time Warner's equipment has never even been returned. Moreover, lost converter boxes pose serious threat to cable operators because they are presumptively sold on the black market to aid and abet theft of service.

To alleviate these problems, in any situation where the incumbent MVPD agrees to allow an MDU owner or new video service provider to act as an agent for an MDU resident, there should be an affirmative obligation on the part of the agent to inform the incumbent operator prior to the switch so as to allow the incumbent to remove and retrieve its equipment beforehand. If an agent fails to comply with this requirement, the agent should be fully responsible for the full value (not the depreciated value) of the equipment to the extent it is damaged or not returned. Depreciated value fails to provide alternative providers and MDU owners with adequate incentive to protect an incumbent provider's equipment.

Finally, Time Warner is often not informed of a subscribers' switch to a new service provider by the subscriber's so-called agent, a practice that often aggravates former customers who are mistakenly billed, even though they no longer receive service from Time Warner. Such offenses should ideally result in the so-called agent being fully responsible for the accrued monthly service charges between the time the subscriber's service was terminated, and the time that the agent notifies the former provider of the switch.

5. FCC Regulations Should Promote Reasonable Sharing Of Any Excess Capacity In Hallway Moldings Or Internal Conduit.

At paragraph 83 of the Further Notice, the Commission proposes "to permit the alternative service provider to install its wiring within the existing molding or conduit, even over the incumbent provider's objection, when there is room in the molding or conduit and the MDU owner does not object." Such a proposal might be acceptable in situations where the molding or conduit is owned by the MDU owner. However, in many cases the incumbent provider owns the molding, or has contracted with the MDU owner for the exclusive right to occupy the conduits or moldings. In such cases, the Commission proposal would constitute an unconstitutional taking of the incumbent MVPD's property.[92]

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[92]See Section IV.C., *infra*.